

# Testimony Before the Michigan House

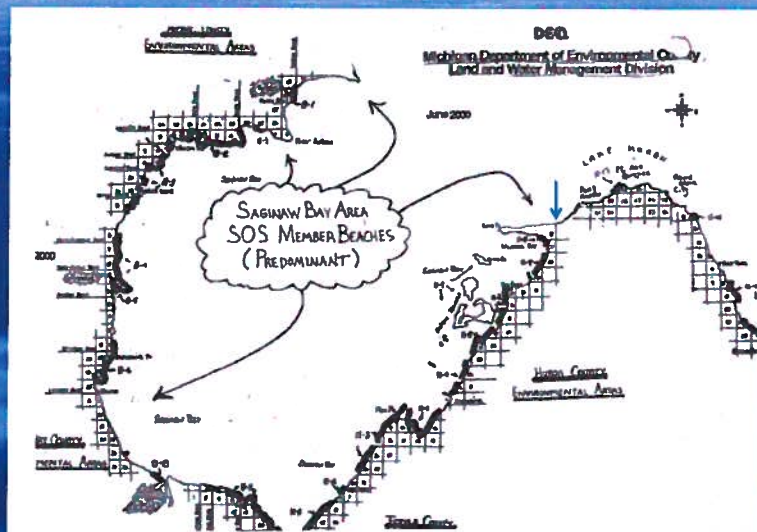
## Natural Resources, Tourism, and Outdoor Recreation Committee

May 29, 2012

Presented by:  
Joseph E. McBride

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## Saginaw Bay Area



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## Beach Maintenance History

Prior to 2000

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Trees, branches and dead vegetation  
to clean up each Spring



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Plastics, beer cans, zebra mussels and  
vegetation to clean up each Spring



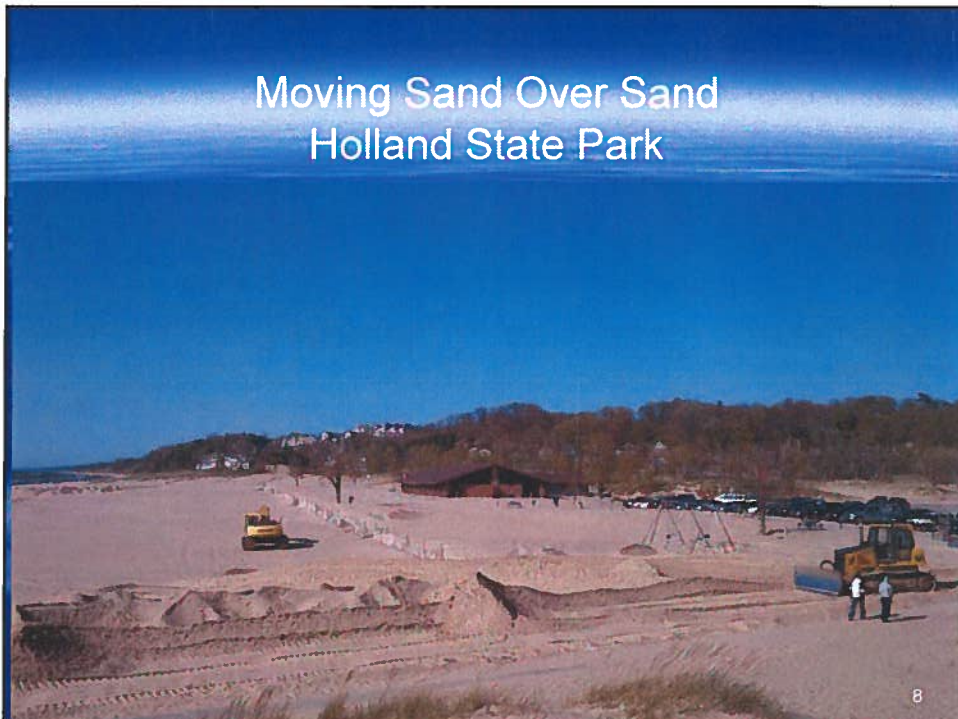
Sand Accumulation



Moving Sand Over Sand



Moving Sand Over Sand  
Holland State Park





Removing Plastic, Glass, Fish Hooks, Muck  
and other Debris from Sand




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History After 2000

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## Areas Below Elevation 580.5 **Owned** By The State

STATE OF MICHIGAN



JOHN ENGLER, Governor

**DEPARTMENT OF ENVIRONMENTAL QUALITY**

*"Better Service for a Better Environment"*

HOLLISTER BURN BLDG. PO BOX 30473, LANSING MI 48209-7873

INTERNET: [www.deq.state.mi.us](http://www.deq.state.mi.us)

RUSSELL J. HARDING, Director

REPLY TO:  
SACRAMENTO DISTRICT OFFICE  
SUITE 1  
500 N EUCALYPT AVE  
DAY CITY MI 49829-7605

September 3, 2002

Bottomlands of the Great Lakes are owned by the State of Michigan and are generally those areas lakeward of the ordinary high water line, defined as areas below elevation 580.5 IGLD85 for Lake Huron. This elevation is approximately three feet above July 2001 levels. Several State statutes regulate these areas and adjacent wetlands.

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### STATE DOES NOT OWN ALL AREAS BELOW 580.5 IGLD85 (From Part 325)

#### **Glass v Goeckel, 473 Mich 667, 682 (2005):**

"First, the act does not show a legislative intent to take title to all land lakeward of the ordinary high water mark."

#### **Michigan Land Title Standard 24.6:**

"The waterfront boundary line of real property abutting the Great Lakes is...the naturally occurring water's edge," citing *Hilt v Weber*, 252 Mich 198 (1930) and *Peterman v DNR*, 446 Mich 177 (1994).

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Michigan Supreme Court 2005

OHWL is where “the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other **easily** recognized characteristics.”



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## Army Corps of Engineers Has Jurisdiction to **581.5 feet**



DEPARTMENT OF THE ARMY  
DETROIT DISTRICT, CORPS OF ENGINEERS  
BOX 1027  
DETROIT, MICHIGAN 48231-1027

August 30, 2001

IN REPLY REFER TO

Engineering & Technical Services  
Regulatory Office  
File No. 01-016-303-0

In Lake Huron, the OHWL extends to 581.5 feet International Great Lakes Datum (1985). The OHWL is a fixed contour and is used to define the shoreward limit of the Corps' regulatory jurisdiction on navigable waters such as Saginaw Bay. Although Saginaw Bay's water levels constantly fluctuate, the Corps' jurisdiction over activities in Saginaw Bay is fixed to the unchanging OHWL. The Corps' Section 10 and Section 404 jurisdiction is also independent of property lines. The Corps' jurisdiction extends to the landward extent of the OHWL even if property lines are platted to the "waters edge" or a meander line. A substantive body of Federal case law has affirmed the Corps' Section 10 and Section 404 jurisdiction in navigable waters.

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Federal Law – 22 33 CFR 328.3(e) Provides

The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, **the presence of litter and debris**, or other appropriate means that consider the characteristics of the surrounding areas.

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## **FEDERAL DISTRICT COURT FOUND IN THE KINCAID CASE**

- **The concept of an administrative OHWM finds no support in federal law.**
- **That reliance by the government on an administrative OHWM was unreasonable.**

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## ARMY CORPS OF ENGINEERS DETROIT DISTRICT MEMO June 2007

•Can not rely upon an elevation but must look for:

- ☐ a clear, natural line  
impressed on the bank
- ☐ the presence of litter and debris
- ☐ changes in the character of soil
- ☐ destruction of terrestrial vegetation
- ☐ shelving
- ☐ other

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## Consequences of MDEQ & Army Corps Actions

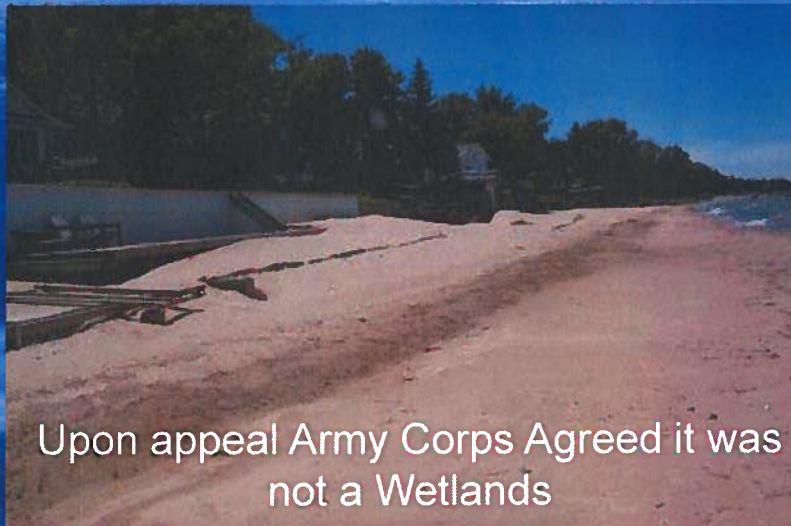


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## The Army Corps Said This Was a Wetlands



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463 F.Supp.2d 680  
(Cite as: 463 F.Supp.2d 680)

**C**

United States District Court,  
E.D. Michigan,  
Southern Division.  
UNITED STATES of America, Plaintiff,  
v.  
MARION L. KINCAID TRUST and Marion L. Kin-  
caid, Trustee, Defendants.

No. 02-10149.  
Nov. 3, 2006.

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The Army Corps Said The Kincaid's Were Doing  
Work On Their Beach Without a Permit  
Stop or Face **Fines of \$25,000/day**





## Stagnate Water



## Bacterial Infections



## Phragmites



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## Cattails



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## Phragmites



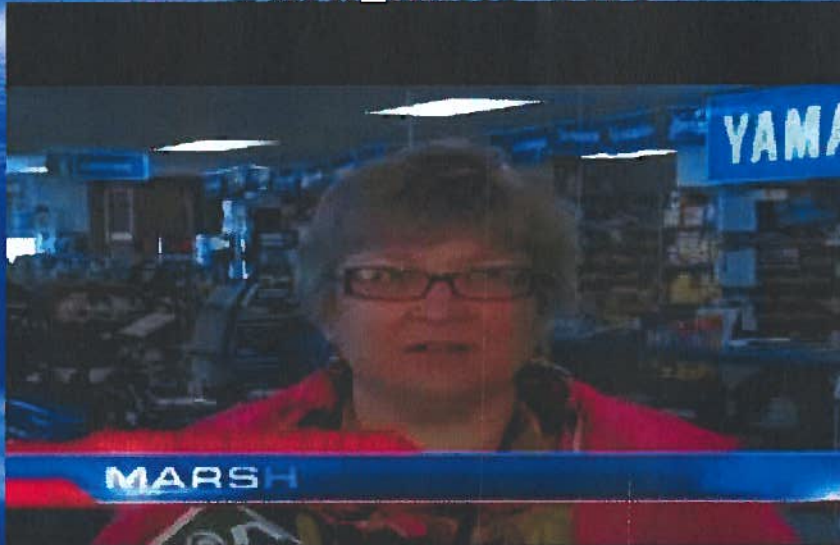
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## Phragmites



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## Phragmites Fire



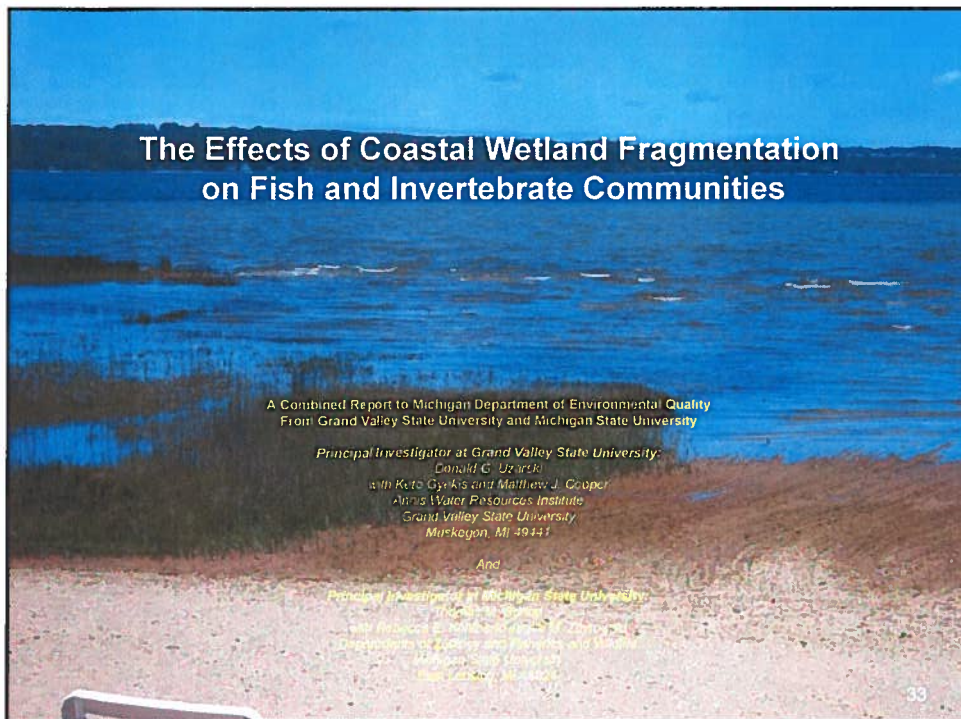
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## PA 14 - 2003

Act No. 14  
Public Acts of 2003  
Approved by the Governor  
June 4, 2003  
Filed with the Secretary of State  
June 5, 2003  
EFFECTIVE DATE: June 5, 2003

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## SOS's PEER REVIEW OF DEQ's STUDY

- None of the research was specifically designed or undertaken for the purpose of evaluating the impacts on maintenance activities as the law required.
- Misleading effect of data manipulation and analysis.
- Data sampling was not random, thereby permitting the study to be biased.

## PEER REVIEW OF DEQ's STUDY

- **Lack of perspective – much less than 1% of the coastline in Saginaw Bay was impacted.**
- **Validity of referenced sites – initial design abandoned – contiguous referenced and treatment sites.**

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## Your Choice!





Thank you!



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